United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

74-2044

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No. 74-2044

LOCAL 1104, COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO AND LOCAL 1101, COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,

Petitioners,

—against—

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

PETITIONER'S BRIEF

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Statement

This is a Petition for Review in which Local 1104, Communications Workers of America, AFL-CIO ("Local 1104") and Local 1101, Communications Workers of America ("Local 1101") seek review of an Order of the National Labor Relations Board (the "NLRB" or the "Board") dated June 6, 1974, which adopted the recommended order of the Administrative Law Judge (the "ALJ") and directed the respondent unions (petitioners here) to take the action set forth therein.

The Issues

This Petition presents two issues:

1. Whether a labor union, which has lawfully excluded a unit employee from full membership because he has committed an act disloyal to or destructive of the union, but which is nevertheless obligated by law to represent him

in collective bargaining and in the administration of the agreement resulting therefrom, is prohibited by Section 8(b)(1)(A) and (2) of the Labor Management Relations Act, 1947, as amended (the "Act", 29 U.S.C. § 158(b)(1)(A) and (2) to compel him, under an agency shop clause in said agreement, to pay the agency fees which represent his share of the union's cost of negotiating and administering the agreement?

2. Whether a labor union may be held to have violated Section 8(b)(1)(A) and (2) of the Act in denying full membership to unit employees who crossed a union picket line in a strike called before the expiration of the notice period required by Section 8(d) 29 U.S.C. § 158(d), where the charge for denying membership was filed more than six months after the strike had ended and where the employees crossed the picket line not because of the illegality of the strike, of which they were unaware, but because they disapproved of the strike and, in defiance of and disloyalty to the union, refused to participate in it?

The Proceedings Below and the Facts

This Petition, like the proceedings before the Board, involves two consolidated cases which will be referred to, respectively, as the "Rigby" case and the "Telco" case.

(1) The Rigby Case.

This case arose from an unfair labor practice charge filed October 17, 1972 by Wellington G. Rigby ("Rigby"), an employee of New York Telephone Company ("Telco") against Local 1104 (3a).[1]

The charge alleged in substance, that Local 1104 had (a) unlawfully denied membership to Rigby, and (b) unlawfully requested Telco to terminate his employment be-

1. This and similar numbers refer to pages in the Joint Appendix.

cause of his failure to pay the fees required by the agency shop provision of the Collective Bargaining Agreement (the "Collective Agreement") between Telco and Communication Workers of America, AFL-CIO ("CWA"), the collective bargaining representative for the unit of Telco's employees in which he is employed.[2]

Reversing in part, the Regional Director's refusal to issue a complaint on Rigby's charge, the Board's General Counsel nevertheless determined that Local 1104's refusals to accept Rigby into membership because of his dual unionism in attempting to replace CWA with the Teamsters' Union was lawful, because privileged, under § 8(b)(1)(A) of the Act.[3] He held, however, that the question whether Local 1104 could then compel Rigby, under threat of discharge, to pay agency shop fees under the Collective Agreement ". . . raised issues warranting Board determination on the basis of record testimony" (13a-14a).

Accordingly, a complaint was issued charging Local 1104 with the unfair labor practice of attempting to cause Telco to discriminate against Rigby who had been denied membership in Local 1104 on a ground other than failure to tender dues and initiation fees, in violation of Section 8(b)(2) and Section 2(6) and (7) of the Act (4a-8a).

(2) The Telco Case.

This case arose from a charge filed on February 2, 1973 by Telco against Local 1101 (19a).

2. CWA is an International union of which Local 1104 and Local 1101 (see *infra*) are constituent locals. CWA, Local 1104 and Local 1101 are sometimes collectively referred to herein as "the Unions."

3. This decision is final and not reviewable by the Courts. *Local 282, IBT v. NLRB*, 339 F. 2d 795 (C.A. 2d, 1964); *Bandlow v. Rothman*, 278 F. 2d 866 (C.A.D.C., 1960), *cert. den.*, 364 U.S. 909, 5 L. ed. 2d 224 (1960), *Piasecki Aircraft Corp. v. NLRB*, 280 F. 2d 575, 588 (C.A. 3d, 1960) *cert. den.* 364 U.S. 933, 5 L. ed. 2d 365 (1961).

The charge alleged that Local 1101 had (a) unlawfully denied membership to certain employees of Telco, (the "Strikebreakers"), and (b) unlawfully demanded that Telco discharge such employees for failure to pay the agency fees required by the agency shop provision of the Collective Agreement between Telco and CWA (19a).

As in the *Rigby* case, the complaint that was issued alleged that Local 1101 had engaged in the unfair labor practice of attempting to cause Telco to discriminate against employees who had been denied membership on a ground other than failure to tender dues and initiation fees, in violation of Sections 8(b)(2) and 2(6) and (7) of the Act. In the *Telco* case, as distinguished from the *Rigby* case, however, the amended complaint also alleged that Local 1101 had violated Section 8(b)(1)(A) of the Act in denying membership to the Strikebreakers because such denial had been predicated upon their refusal to participate in a strike of Local 1101 which was unlawful because the requisite notice under Section 8(d) had not been given (23a ¶ 10).

(3) The Facts.

The material facts are not disputed.

Local 1104 refused membership to Rigby[4] because he had engaged in organizational activities on behalf of a rival union, namely, a local of the Teamsters, at a time when CWA was the certified collective bargaining representative of the Telco employees (19a, 13a, 14a, 42a, 54a-55a).

Local 1101 refused membership to the Strikebreakers because of their strikebreaking activities in crossing its picket lines during a strike against Telco (76a). The

4. He had formerly been a member of Local 1104 but had resigned.

strike in question began in July 1971 and ended on February 17, 1972 (73a-74a). Concededly, the strike was begun without meeting the notice requirements of Section 8(d) of the Act. The record is devoid of any evidence that the Strikebreakers' refusal to observe the picket lines of Local 1101 was motivated by this lack of notice; nor is there anything in the record to remotely suggest that this technical illegality was known to the Strikebreakers or in any way impelled them to refuse to honor the picket lines. They simply disapproved of the strike and therefore refused to participate in it. The charge against Local 1101 was filed on February 2, 1973, almost a year after the strike had ended (19a).

The Collective Agreement, which is applicable both to Rigby and the Strikebreakers, contains an agency shop clause which, insofar as pertinent, provides:

> "Each regular employee shall, as a condition of employment, pay or tender to the Union amounts equal to the periodic dues applicable to members for the period beginning 30 days after hire or 30 days after February 17, 1972, whichever occurs later, until the termination of the collective bargaining agreement..." (32a-33a).

The agency shop fees are used solely to provide services, activities and benefits in which non-members of the Unions participate equally with members. Both Rigby and the Strikebreakers, as employees of Telco covered by the Collective Agreement, have been fully represented by the Unions in all matters pertaining to their wages, hours and working conditions, regardless of the fact that they have not been formal members of the Unions. By reason of their refusal to pay the agency shop fees required by the Collective Agreement, they have received the benefit of this

representation without making any payment therefor or contributing in any way to the financial support of the Unions (16a, 28a-29a, 50a-51a).

(4) The Decision of the Board.

The Board affirmed without opinion the rulings, findings and conclusions set forth in the Decision of John P. von Rohr, the Administrative Law Judge (96a-97a).

That Decision, without discussing in any way the important questions of law and of policy presented herein, simply followed two earlier Board decisions and held that the action of the Unions, in seeking to compel Rigby and the Strikebreakers to pay agency fees after having denied them full union membership, violated Sections 8(b)(1)(A) and 8(b)(2) of the Act (70a-91a). The earlier Board cases on which the ALJ relied were *Local 4186, United Steelworkers of America, AFL-CIO (McGraw Edison Company)* 181 NLRB 992 (1970) and *Communications Workers of America, Local 9509, AFL-CIO (The Pacific Telephone and Telegraph Company)*, 193 NLRB 83 (1971). In those cases the Board had held, in the most general terms, that a union which seeks, under a union security clause, to compel payment of dues from an employee whose membership rights have been "significantly reduced" for whatever reason, violates Sections 8(b)(1)(A) and (2). Each of those cases is distinguishable from the instant case because in each the employee's membership rights had been reduced because he had invoked Board processes and procedures which he had an absolute right to invoke under the Act—a factor not present in the case at bar. Neither case was ever reviewed by any court, and, of course, neither is in any way binding upon this Court.

It is Petitioners' position that the Board's decisions in both cases, as well as its decision in the case at bar, are

plainly erroneous under the pertinent provisions of the Act as construed by the Courts, and that the effect of the decisions, which is to place unions in the dilemma of having either to forego the concededly lawful defensive measure of excluding disloyal persons from membership or to allow such persons to avoid the payment of their fair share of the cost of union representation, seriously impairs national labor policy.

In the Telco case, the ALJ held, in addition, that Local 1101 violated Section 8(b)(1)(A) by denying full membership to the Strikebreakers for refusing to participate in a strike for which the notice required by Section 8(d) had not been given. It is the Petitioners' position that as the Strikebreakers' refusal to honor the picket lines was not motivated by the Union's failure to give Section 8(d) notice, but was simply an act of disloyalty in refusing to observe *any* strike that the Union might call, the Union acted lawfully in denying them membership under the well settled authorities holding that unions may exclude employees from membership in order to protect themselves against disloyalty and subversion,—which clearly existed in this case and was not excused by the unrelated and wholly fortuitous 8(d) defect. Petitioners also urge that, as the failure to give the 8(d) notice occurred, and the strike itself ended, more than six months before the filing of the charge in this case, the Board is precluded by the six month limitation in Section 10(b) from asserting the illegality of the strike as the basis for finding that Local 1101 violated Section 8(b)(1)(A) in excluding the Strikebreakers from membership.

POINT I

The Unions have the right under the Act to require that employees whom they have lawfully excluded from full membership because of disloyalty must nevertheless pay agency fees under the agency shop clause in the Collective Agreement. To deny them that right would seriously impair national labor policy.

A. Under Sections 8(a)(3), 8(b)(1)(A) and 8(b)(2), as Construed by Authoritative Court Decisions and by the Board, Employees who Refuse to Maintain Full Union Membership, or Whose Conduct Justifies the Union in Denying them such Membership, Must Nevertheless Pay Dues or Agency Fees Pursuant to a Union Security Clause.

The Decision of the Board sought to be reviewed herein, as well as its earlier decisions upon which it now relies,[5] hold broadly that *whenever* a union excludes an employee from full membership or significantly limits his membership rights, it is prohibited by Sections 8(b)(1)(A) and 8(b)(2) from requiring him to pay union dues or agency fees pursuant to a union security clause. Under these decisions, the union may not require the excluded employee to pay such dues or fees even though he was excluded because of an act of disloyalty to the union (e.g., activities on behalf of a rival union or refusal to engage in union supported concerted activities), and even though it is well settled by both court and Board decisions that exclusion for such reasons is lawful under the proviso of Section 8(b)(1)(A) which provides:

> . . . this paragraph shall not impair the right of a labor organization to prescribe its own rules with

5. *Local 1186, United Steelworkers of America, (McGraw Edison Company)*, 181 NLRB 992 (1970) and *Communications Workers of America, Local 9509 (The Pacific Telephone and Telegraph Company)*, 193 NLRB 83 (1971).

respect to the acquisition or retention of membership therein.[6]

The Board, in the case at bar in *McGraw Edison* and *Pacific Telephone and Telegraph Company*, reached an anomalous result, namely, that although a union may for self-protection lawfully deny full membership rights to a disloyal employee, it may not then require him to pay the dues or fees that constitute his share of the cost of the representation that it is required by law to provide for all employees, disloyal as well as loyal.

The Board reached this result because it ignored authoritative court decisions, which the Agency itself has followed, holding that the only membership an employee may be required to maintain under a union security clause is "financial core" membership, i.e., the payment of dues or fees, and that an employee who refuses to maintain full union membership, or whose conduct justifies the union in denying him such membership, must nevertheless maintain his "financial core" membership, i.e., must pay the dues or fees required under a union security clause. *NLRB* v. *General Motors Corporation*, 373 U.S. 734 (1963); *Union Starch & Refining Co.* v. *NLRB*, 186 F. 2d 1008

6. *NLRB* v. *District Lodge No. 99*, 489 F. 2d 769 (C.A. 1st, 1974); *Price* v. *NLRB*, 373 F. 2d 443 (C.A. 9th, 1967), *cert. den.* 392 U.S. 904 (1968); *Texas Tube Products, Inc.*, 151 NLRB 46 (1965); *United Steelworkers of America, Local 4028 (Pittsburgh Des Moines Steel)*, 154 NLRB 692 (1965); *International Molders and Allied Workers Union, Local 125 (Blackhawk Tanning Co., Inc.)*, 178 NLRB 208; *cf., Scofield* v. *NLRB*, 394 U.S. 423 (1969); *Local 1255, Int. Asso. of Mach., etc.* v. *NLRB*, 456 F. 2d 1214 (C.A. 5th, 1972); *Machinists Lodge 113 (American Hospital Supply Corp.)*, 84 LRRM 1601, 207 NLRB No. 127 (1973); *Printing Specialties, etc. Union No. 181 (Westvaco Corporation)*, 183 NLRB 1271 (1970); *United Lodge No. 66 I.A. of M. and A.W. (Smith-Lee Co.)*, 182 NLRB 849 (1970).

(C.A. 7th, 1951), *cert. den.*, 342 U.S. 815 (1951); *cf. Lewis* v. *AFTRA*, 34 N.Y. 2d 265, 357 N.Y.S. 2d 419, 432, 86 LRRM 2892, 2897 (1974), *Hershey Foods Corp.*, 207 NLRB No. 141, 85 LRRM 1004 (1973); *Molders Local 125 (Blackhawk Tanning Co.), supra.*

In *Union Starch*, the union refused to accept dues tendered by unit employees who were ineligible for membership because they had refused to take an oath of loyalty to the union required by its constitution; and upon demand of the union, the employer discharged the employees under the union security clause. Upon charges filed by the employees, the Board held that both union and employer had committed an unfair labor practice and directed reinstatement of the employees with back pay. Upon cross-petitions to review and to enforce the Board's order, the Court granted enforcement. In doing so, it stated the issue before it as follows:

> The principal question involved is whether employees who request union membership *and tender initiation fees and dues*, but fail to comply with other union-imposed conditions for acquisition of membership, are protected by the Act from discharge under the terms of a valid union security agreement. (186 F. 2d at p. 1010; italics supplied)

It went on to describe as follows, and to approve, the Board's interpretation of the second provisos in Section 8(a)(3) of the Act:

> A majority of the Board was of the opinion that the provisos spell out two separate and distinct limitations on the use of the type of union security agreements permitted by the Act; that proviso (A) protects from discharge for nonmembership in the

> contracting union any employee to whom membership was not available for some discriminatory reason, and that proviso (B) protects the employee who *tenders the requisite amount of dues and initiation fee* and is denied membership for any other reason, even though that reason be nondiscriminatory. It concluded that if a union "imposes any other qualifications and conditions for membership with which he is unwilling to comply, such an employee may not be entitled to membership, but he is entitled to keep his job." (186 F. 2d at p. 1011; italics supplied).

The Court concluded:

> We agree that the Union had the right, under the statute here involved, to prescribe nondiscriminatory terms and conditions for acquiring membership in the Union, but we are unable to agree that it may adopt a rule that requires the discharge of an employee for reasons *other than the failure of the employee to tender the periodic dues and initiation fees.* We think the Board construed the statute in a reasonable manner and gave effect to all its provisions, and that its interpretation was in harmony with the purpose of Congress to prevent utilization of union security agreements except to compel payment of dues and initiation fees, and that the Board was justified in its conclusions. (186 F. 2d at p. 1012; italics supplied)

The decision of the Court in *Union Starch* was plainly predicated upon the premise that where a unit employee is lawfully excluded by the union from full membership rights for refusal to observe a valid union rule "with

respect to the acquisition or retention of membership therein,"[7] he may nevertheless be required under a union security clause to pay his union dues. Otherwise the case would have been decided on the broad proposition, relied on by the Board in the case at bar and in *McGraw Edison* and *Pacific Telephone and Telegraph*, that an employee may under no circumstances be deprived of his job for refusal to pay dues where the union has excluded him or curtailed his membership rights for any reason; and the Court would not have predicated its decision, as it clearly did, on the fact that the complainants had indeed tendered their dues and initiation fees and on its construction of Sections 8(a)(3) and 8(b)(2) to prohibit loss of job only "for reasons other than the failure of the employee to tender the periodic dues and initiation fees" (186 F. 2d at p. 1012, quoted at p. 11, *supra*).

The decision in *Union Starch* was approved and the same construction of Sections 8(a)(3) and 8(b)(2) of the Act was adopted by the Supreme Court in *NLRB* v. *General Motors Corporation*, 373 U.S. 734 (1963).

That case arose as the result of a 1959 decision of an Indiana Court that an agency shop arrangement, under which all employees are required as a condition of employment to pay union dues and initiation fees but need not actually become union members, would not violate the State "right-to-work" law. The United Automobile Workers ("UAW") which represented the employees of General Motors ("GM") thereupon requested GM to negotiate an agency shop clause in the collective agreements covering its Indiana plants. GM refused to bargain over the proposal on the ground that such a provision would violate the Act. The UAW then filed a refusal to bargain charge against GM alleging a violation of Section 8(a)(5) of the Act.

7. Section 8(b)(1)(A) of the Act.

The Board found that an agency shop clause is a permissible form of union security within the meaning of Sections 7 and 8(a)(3) of the Act and, accordingly, ordered GM to bargain over the proposed arrangement.

Upon GM's petition for review, the Court of Appeals found that "the Act does not authorize agreements requiring payment of membership dues to a union, in lieu of membership, as a condition of employment" (373 U.S. at p. 738) and, accordingly, held that GM was not required to bargain over the proposed agency shop clause.

The Supreme Court reversed and ordered GM to bargain with respect the requested agency shop. Its decision was predicated upon its finding that when Section 8(a)(3) is construed in the light of its purposes and its legislative history, the term "membership" as used in that Section simply means the obligation of union employees to pay initiation fees and dues and that, accordingly, an agency shop clause, which requires simply the payment of dues without requiring full membership in the union, is valid under the Act.

In its opinion, the Court quoted the second proviso to Section 8(a)(3)[8] and analyzed its objectives as follows (373 U.S. at pp. 740-741, 10 L. ed. 2d at p. 675):

> These additions were intended to accomplish twin purposes. On the one hand, the most serious abuses

8. ". . . no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership . . ."

> of compulsory unionism were eliminated by abolishing the closed shop. On the other hand, Congress recognized that in the absence of a union-security provision "many employees sharing the benefits of what unions are able to accomplish by collective bargaining will refuse to pay their share of the cost." S Rep No. 105, 80th Cong. 1st Sess., p. 6, 1 Leg Hist LMRA 412. Consequently, under the new law "employers would still be permitted to enter into agreements requiring all the employees in a given bargaining unit to become members 30 days after being hired," but "expulsion from a union cannot be a ground of compulsory discharge if the worker is not delinquent in paying his initiation fee or dues." S Rep No. 105, p. 7, 1 Leg Hist LMRA 413. The amendments were intended only to "remedy the most serious abuses of compulsory union membership and yet give employers and unions who feel that such agreements promoted stability by eliminating 'free riders' the right to continue such arrangements." Ibid. As far as the federal law was concerned, all employees could be required to pay their way.

In answer to the Court of Appeal's finding that the express language of the proviso permits employment to be conditioned only upon "membership," and that the agency shop, which does not require actual membership but only payment of monies equal to dues and initiation fees is, accordingly, unlawful, the Supreme Court found that the word "membership" as used in the proviso is limited to the obligation to pay dues, saying (373 U.S. at p. 742, 10 L. ed. 2d at p. 676):

> Under the second proviso to § 8(a)(3), the burdens of membership upon which employment may be

> conditioned are expressly limited to the payment of initiation fees and monthly dues. It is permissible to condition employment upon membership, but membership, insofar as it has significance to employment rights, may in turn be conditioned only upon payment of fees and dues. "Membership" as a condition of employment is whittled down to its financial core.

In holding that the only membership that an employee can be compelled to maintain under Section 8(a)(3) is "financial core" membership, the Supreme Court in *General Motors* adopted the substance of the rule enunciated in *Union Starch*, namely, that an employee who refuses to maintain full membership in a union, or whose conduct justifies the union in denying him such membership, may not be deprived of his job under a union security clause as long as, *but only as long as*, he pays the dues and fees required thereunder. In the Court's words:

> The proposal for requiring the payment of dues and fees [through an agency shop clause] imposes no burdens not imposed by a permissible union shop contract and compels the performance of only those duties of membership which are enforceable by discharge under a union shop arrangement. If an employee in a union shop unit refuses to respect any union-imposed obligations *other than the duty to pay dues and fees*, and membership in the union is therefore denied or terminated, the condition of 'membership' for § 8(a)(3) purposes is nevertheless satisfied and the employee may not be discharged for nonmembership even though he is not a formal member. (373 U.S. at p. 743, citing *Union Starch* in ftn. 10; italics supplied)

In short, there are two kinds of union membership. One is the "membership" ("financial core" membership) which, under Section 8(a)(3), is the only kind of membership that may be made a condition of employment. That membership requires of the employee only the payment of fees or dues pursuant to the union security clause, and requires of the union only that the employee be permitted to keep his job and be afforded the same union representation as all other unit employees. The other kind of membership is "full membership" which, under the proviso of Section 8(b)(1)(A), may be conditioned not only upon dues payments, but also upon loyalty to the union and observance of its lawful rules and policies (see pp. 8, 9, *supra*, and the authorities cited in ftn. 6).

In *Union Starch*, the employees were lawfully excluded from full union membership because of their refusal to take the oath required by the union's rules; but they could not be deprived of their jobs *as long as they paid their dues*, i.e., as long as they maintained their "financial core" membership.

In the case at bar, Rigby and the Strikebreakers were similarly lawfully excluded by the Unions because of their disloyalty.[9] They may not be discharged under the agency shop clause as long as they pay their agency fees and thereby maintain their "financial core" membership. But they cannot excuse their refusal to pay such fees on the basis of the fact that full membership has been denied to

9. The General Counsel has conceded that Rigby's exclusion for disloyalty in seeking to promote a rival union was lawful under the proviso of Section 8(b)(1)(A). (13a, 14a, 50a-58a) Although the Board found that the exclusion of the Strikebreakers was unlawful because of the alleged illegality of the strike, we believe that this Court will reverse that decision for the reasons set forth in Point II, *infra*, at pp. 22-28.

them where such denial is lawful and privileged under Section 8(b)(1)(A).[10]

The fact that Rigby and the Strikebreakers may be excluded from "full membership" in the Unions because of their disloyalty and at the same time may be required, under pain of discharge, to maintain their "financial core" membership by payment of agency shop fees, does not present a situation where they are being compelled to contribute to the support of a "closed" union or to a union that discriminates in respect to admissions to membership or to a union which employees are not free to join at their option. The Unions in the case at bar are open to everyone on the same basis, and every unit employee has the "option of membership" referred to by the Court in *General Motors* (373 U.S. at p. 744, see esp. footnote 12 on that page). It is plain that, under the decisions in *Union Starch* and *General Motors*, if the complainants in this case had refused to join the Unions, they could nevertheless have been required to pay agency fees under the Collective Agreement. No different rule can obtain where employees are lawfully excluded from a union for disloyalty or violation of valid union rules.

There is nothing in *Union Starch*, *General Motors* or any other case,[11] that remotely suggests that the "option of membership" includes both the right to demand full

10. A discussion of the intent and policy of Congress that unions should have the power to use internal disciplinary proceedings to protect their existence and integrity against dual unionism and other disloyal and destructive acts is set forth in Point I B, *infra*, at pp. 21, 22.

11. Except the decision of the Board sought to be reviewed herein and the Board cases of *McGraw Edison*, *supra*, and *Pacific Telephone and Telegraph*, *supra*, on which the Board's decision below was predicated.

membership and the right to violate lawful union-imposed obligations. An employee who chooses to violate a valid union rule or policy has thereby, in substance and effect, chosen to exercise his option not to join the union. He may not use his voluntary act in so doing to obtain a "free ride." He may not thereby avoid his obligation under the agency shop agreement to furnish his fair share of financial support to his collective bargaining representative or escape the sanction of discharge if he fails to do so.

B. To Compel the Unions to Choose between the Alternatives either of Admitting Disloyal Employees to Full Membership or of Excusing Them from Paying Their Share of the Cost of Union Representation would Violate Fundamental National Labor Policy.

The central premise of our labor policy, under the Act as construed by the courts, is that industrial relations are best ordered through collective bargaining between employers and unions selected by a majority of the employees in a unit, which represent and have the power to act for all such employees.

> "National labor policy has been built on the premise that by pooling their economic strength and acting through a labor organization freely chosen by the majority, the employees of an appropriate unit have the most effective means of bargaining for improvements in wages, hours, and working conditions. The policy therefore extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees." *NLRB* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967).

As a direct consequence of this policy, the courts have developed the principle that a union which is the collective bargaining representative of a unit of employees has a "statutory duty fairly to represent all of those employees, both in its collective bargaining . . . and in its enforcement of the resulting collective bargaining agreement. . . ." *Vaca* v. *Sipes*, 386 U.S. 171, 177, 17 L. ed. 2d 842, 850 (1967). As the Supreme Court declared in *Allis-Chalmers*, *supra* (388 U.S. at p. 181):

> It was because the national labor policy vested unions with power to order the relations of employees with their employer that this Court found it necessary to fashion the duty of fair representation. That duty "has stood as a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law." *Vaca* v. *Sipes*, 386 U.S. 171, 182, 17 L. ed. 2d 842, 853, 87 S. Ct. 903.

The effectuation of the national labor policy that collective bargaining and the administration of resulting agreements be conducted between employers and strong unions with the power and the duty fairly to represent all employees in the unit, can be assured only if two essential auxiliary policies are maintained, without which unions, on the one hand, could be throttled by inadequate financial resources, and, on the other hand, could suffer erosion and subversion at the hands of disloyal members and hostile unit employees. These policies are: 1) that a labor union acting as collective bargaining representative for a unit of employees should be able to require each employee whom it represents to pay his proportionate share of the cost of such representation, and 2) that a union must have the power to protect its existence and integrity against erosion

through discipline of members who violate its rules and exclusion from membership of persons who have shown themselves to be subversive or hostile.

The first of these policies, namely, that unions should be able to require employees whom they represent to pay their way, finds its statutory embodiment in the provisions of the Act that sanction union security clauses, particularly in Section 8(a)(3), which expressly sanctions the discharge of unit employees to compel the payment of dues. It was on this policy that the Supreme Court predicated its decision in *General Motors*, *supra*, upholding the legality of the agency shop; and the Court articulated the policy in that portion of its opinion quoted at pp. 13, 14, *supra*. The same policy is enunciated in *Radio Officers Union* v. *NLRB*, 347 U.S. 17, 41 (1954), where the Court, after referring to Section 8(a)(3) and its legislative history, said:

> This legislative history clearly indicates that Congress intended to prevent utilization of union security agreements for any purpose other than to compel payment of union dues and fees. Thus Congress recognized the validity of unions' concern about "free riders," i.e., employees who receive the benefits of union representation but are unwilling to contribute their share of financial support to such union, and gave unions the power to contract to meet that problem while withholding from unions the power to cause the discharge of employees for any other reason.

The second auxiliary policy which is essential to the effectuation of the national labor policy in respect to collective bargaining is that a union must have the power to protect its existence and integrity against erosion by being able to discipline members and exclude non-members who

commit acts of disloyalty or violate its rules. This policy finds its principal statutory embodiment[12] in the proviso to Section 8(b)(1)(A) of the Act, namely—

> . . . That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; . . .

The leading judicial articulation of the policy is contained in *NLRB* v. *Allis-Chalmers Mfg. Co.*, *supra*, where the Supreme Court declared (388 U.S. at p. 181):

> Integral to this federal labor policy has been the power in the chosen union to protect against erosion its status under that policy through reasonable discipline of members who violate rules and regulations governing membership.

In enunciating this policy, the Court found support not only in the language and legislative history of Section 8(b)(1)(A) (see the opinion of the Court at 388 U.S. pp. 179-193), but also in the language of the Labor Management Reporting and Disclosure Act of 1959, with respect to which the Court stated (388 U.S. at p. 194):

> In 1959 Congress did seek to protect union members in their relationship to the union by adopting measures to insure the provision of democratic processes in the conduct of union affairs and procedural due process to members subjected to discipline. Even then, some Senators emphasized that in establishing and enforcing statutory standards great care should be taken not to undermine union self-government or weaken unions in their role as col-

12. It is also embodied in Section 101(a)(2) of the Labor Management Reporting and Disclosure Act of 1959 [29 U.S.C. § 411(a)(2)], see *infra*, p. 25.

> lective-bargaining agents. S Rep No. 187, 86th Cong, 1st Sess. 7. The Eighty-sixth Congress was thus plainly of the view that union self-government was not regulated in 1947. Indeed, that Congress expressly recognized that a union member may be "fined, suspended, expelled, or otherwise disciplined", and enacted only procedural requirements to be observed. 73 Stat. 523, 29 USC § 411(a)(5). Moreover, Congress added a proviso to the guarantee of freedom of speech and assembly disclaiming any intent "to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution . . ." 29 USC § 411 (a)(2).

In accordance with the policy that a union must be enabled to maintain its integrity and protect its status as collective bargaining representative, it has universally been held by the Courts and the Board that a union may expel or suspend a member or exclude a non-member who has sought to undermine the union by activities on behalf of a rival union or by strikebreaking or other disloyal action, and that such expulsion or exclusion is lawful and protected by the proviso of Section 8(b)(1)(A). *Price* v. *NLRB* 373 F. 2d 443 (C.A. 9th, 1967), *cert. den.* 392 U.S. 904 (1968); *NLRB* v. *International Moulders & Allied Workers Union*, 442 F. 2d 92, 94 (C.A. 7th, 1971); *Tri-Rivers Marine Engineers Union*, 189 NLRB 838, 1971 CCH NLRB, Sec. 22,957 (1971); *Tavas Tube Products, Inc.*, 151 NLRB 46 (1965); *United Steelworkers of America, Local 4028 (Pittsburgh Des Moines Steel Co.)*, 154 NLRB 692 (1965); cf. *Machinists Lodge 113 (American Hospital Supply Corp.)* 84 LRRM 1601, 207 NLRB No. 127 (1973); *International Molders and Allied Workers Union, Local 125 (Blackhawk Tanning Co., Inc.)*, 178 NLRB 208

(1969); *United Lodge No. 66, I.A. of M. & A.W. (Smith-Lee Co.)* 182 NLRB 849 (1970); *Printing Specialties, etc., Union 481 (Westvaco Corporation)*, 183 NLRB 1271 (1970). [Cases in which employees were expelled or excluded from unions or otherwise deprived of membership rights for activities on behalf of a rival union]; *NLRB* v. *District Lodge No. 99*, 489 F. 2d 769 (C.A. 1st, 1974); *Loal 1255 Int. Ass'n. of Mach. & A.W.* v. *NLRB*, 456 F. 2d 1214 (C.A. 5th, 1972) [Cases in which employees were excluded from union for strikebreaking].

The reasons why it is essential for unions to have the power to exclude disloyal persons were well stated by the Court in *Price* v. *NLRB*, *supra*, 373 F. 2d at p. 447, where it said:

> [Price] sought to attack the union's position as bargaining agent, which is, as the Board says, in a very real sense an attack on the very existence of the union. We think that, at the least, the proviso [to Section 8(b)(1)(A)] was intended to permit the union to suspend or expel a member who takes such a position. *Otherwise, during the pre-election campaign, the member could campaign against the union while remaining a member and therefore privy to the union's strategy and tactics.* We can see no policy reason for requiring the union to retain a member who takes such a position. See *Tawas Tube Products, Inc.* and *Harold Lohr and United Steelworkers*, 151 NLRB 46 (1965). (Italics added)

In summary, if Local 1104 and Local 1101 are compelled, alternatively, either to admit dual unionist Rigby and the Strikebreakers to membership, or to permit their employment to continue despite their refusal to pay dues

under the agency shop clause of the Collective Agreemnt, one or the other of the foregoing policies will be frustrated. Under the one alternative, the policy that a union must be permitted to protect its existence against erosion and subversion will be defeated. Under the other, the policy to require each employee represented by the union to pay his share of the cost of union representation will go down the drain.

The foregoing authorities plainly establish that neither of these policies should be sacrificed; and there is no reason that either should be in this case. Rigby and the Strikebreakers, even if compelled to pay the equivalent of membership dues under the provisions of Article 33.01 of the collective agreement (32a-33a), without being admitted to union membership, will not lose anything that could be of value to them. They will have the Unions as their collective bargaining representative and they will be entitled to all the benefits of union representation and all other benefits that are available to union members by virtue of their dues payments. In addition, they will have the right to continue to commit acts of disloyalty to the Unions and in violation of their lawful policies. The Unions, in the words of the Supreme Court, will remain

> . . . free to enforce a properly adopted rule which reflects a legitimate union interest, impairs no policy Congress has imbedded in the labor laws, and is reasonably enforced against union members *who are free to leave the union to escape the rule*. (*Scofield* v. *NLRB*, 394 U.S. 423, 430 (1969), italics supplied).

But employees who commit acts of disloyalty to the union and in violation of its lawful policies should not have

the right to participate in its meetings, deliberations, decisions and government. An employees right to participate in such activities has expressly been made ". . . subject to reasonable rules and regulations in such organization's constitution and by-laws" (LMRDA, § 101(a)(1), 29 U.S.C. § 411(a)(i)); and the organization itself has the right ". . . to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution . . ." (LMRDA, § 101(a)(2), 29 U.S.C. § 411(a)(2)). Under these authorities and all those cited above, it is plain that a union should have the power to bar a subversive from its inner councils without sacrificing its right to compel him to pay his fair share of the cost of those services which the union renders with an equal hand to all unit employees, members and non-members alike.

The decision of the Board in this case destroys the power of unions to protect themselves against "free riders". For if Rigby and the Strikebreakers win, then every disgruntled unit employee can avoid the obligation to support the union by the simple expedient of engaging in conduct,—dual unionism or something else—which makes it intolerable for the union to continue him as a member and compels it to expel him. Thereupon, the unit employee—under the decision sought to be reviewed—will be free to stop paying his dues and the union will be powerless to compel him to pay them by threat of discharge. Such a result could seriously weaken labor unions and thereby frustrate the national labor policy enunciated in the authorities cited above.

POINT II

The exclusion of the Strikebreakers from membership in Local 1101 was lawful. In any event the unfair labor practice on which the Board's finding of unlawfulness was predicated was time-barred by the limitation period of Section 10(b).

The Strikebreakers were denied membership in Local 1101 because of their disloyalty in refusing to respect its picket line. This disloyalty is neither mitigated nor excused by the fact that the strike was called without adequate notice under Section 8(d) of the Act.

Although the strike lasted more than seven months, there is not a scintilla of evidence that either Telco or the Strikebreakers ever challenged its legality during that time. Nor is there any evidence that the Strikebreakers ever suggested that their crossing of picket lines was in any way related to a belief or suspicion that the strike was or might be unlawful. If the Strikebreakers had stated that they were crossing the picket lines because they believed the strike was unlawful, that would have indicat that they were acting not out of disloyalty but in observance of the law. There is nothing in the record, however, to show that the Strikebreakers were even aware that the strike had been called before the expiration of the 8(d) notice period. They simply disagreed with the objectives of the strike and therefore refused to honor the Local 1101 picket line.

Thus the fact of the Strikebreakers' disloyalty cannot be denied. Their actions and their motives demonstrated that they were persons of the kind that a union has the right to exclude from membership for its own self-protection and defense under the Section 8(b)(1)(A) proviso and the authorities cited at pp. 21-23, *supra*. Obviously, Local 1101's need to exclude them as a defensive measure is

not mitigated by the unrelated and entirely fortuitous fact, unknown to the Strikebreakers at the time, that the requisite 8(d) notice had not been given.

What the decision of the Board has done, therefore, is to punish Local 1101 for the 8(d) violation by compelling it to admit the Strikebreakers to membership in the face of the 8(b)(1)(A) proviso and in the face of the well settled rule that a union may defend itself and protect its integrity by excluding disloyal employees from membership (see authorities cited at pp. 21-23, *supra*).

But Section 8(d) has its own sanctions. A strike without adequate notice under Section 8(d) constitutes a violation of the duty to bargain collectively and may be enjoined as an unfair labor practice (Section 6(c) and (j)). Further, an employee who engages in such a strike loses his status as an employee under Sections 8 through 10 of the Act (Section 8(d)). There is no reason to believe that, in addition to these severe sanctions, Congress intended to authorize the further sanction of forcing the union to admit to membership employees who worked during the strike not because they thought the strike illegal but simply as an act of disloyalty to the union and in violation of its policies.

What is more, the effect of the Board's decision is to punish Local 1101 for a violation which was time-barred under Section 10(b) long before the filing of the charge against that Local in this case.

The strike began on July 14, 1971 and ended about February 17, 1972. The charge herein against Local 1101 was filed in February, 1973, about a year after the strike had ended. Plainly a charge directly predicated on the 8(d) violation would have then been time-barred. As we have seen, the Board's decision that the exclusion of the Strikebreakers violated Section 8(b)(1)(A) is not only

predicated on the Section 8(d) violation but is in actuality *a sanction imposed upon Local 1101 on account of the 8(d) violation.* Accordingly, the matter is time-barred *a fortiori* under the rule laid down by the Supreme Court in *Local Lodge No. 1424, International Association of Machinists, etc.* v. *NLRB*, 362 U.S. 411 (1960), where the Court held as follows (at pp. 416-417):

> It is doubtless true that § 10(b) does not prevent all use of evidence relating to events transpiring more than six months before the filing and service of an unfair labor practice charge. However, in applying rules of evidence as to the admissibility of past events, due regard for the purposes of § 10(b) requires that two different kinds of situations be distinguished. The first is one where occurrences within the six-month limitation period in and of themselves may constitute, as a substantive matter, unfair labor practices. There, earlier events may be utilized to shed light on the true character of matters occurring within the limitations period; and for that purpose § 10(b) ordinarily does not bar such evidentiary use of anterior events. *The second situation is that where conduct occurring within the limitations period can be charged to be an unfair labor practice only through reliance on an earlier unfair labor practice. There the use of the earlier unfair labor practice is not merely "evidentiary," since it does not simply lay bare a mutative current unfair labor practice. Rather it serves to cloak with illegality that which was otherwise lawful. And where a complaint based upon that earlier event is time-barred, to permit the event itself to be so used in effect results in reviving a legally defunct unfair labor practice.* (italics supplied)

CONCLUSION

For all of the reasons stated herein, it is respectfully prayed that the Board's Order reviewed herein should be set aside in its entirety.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 74-2044

LOCAL 1104, COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO and LOCAL 1101, COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,

Petitioners,

against

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition for Review and Cross-Application for Enforcement of an Order of The National Labor Relations Board

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AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
) SS:
COUNTY OF NEW YORK)

Sarita Puebla, being duly sworn, deposes and says: That she is over twenty-one years of age: That on the 23rd day of October 1974 she served three copies of the attached Petitioner's Brief on Elliot Moore, Esq., Attorney for Respondent and on Frederick D. Braid, Esq., Attorney for Intervenor, Wellington Rigby, by enclosing said copies in fully post-paid wrappers addressed as follows and depositing same in The United States Post Office maintained at No. 150 Christopher Street, New York City, New York.

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Frederick D. Braid, Esq.
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Sarita Puebla

Sworn to before me this

23rd day of October 1974

Quinton C. Van Wynen

QUINTON C. VAN WYNEN
Notary Public, State of New York
No. 24-[illegible]7455
Qualified in [illegible] County
Commission Expires March 30, 1975

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THIS 23rd DAY OF Oct 1914

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